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### The consequences of Brexit for competition litigation

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## The Consequences of Brexit for competition litigation: an end to a “success story”?

### 1. Introduction

The United Kingdom seems to have become of destination of choice for private competition claims: thanks to its perceived efficiency and expertise, the English High Court has attracted an increasing number of plaintiffs not just from within Britain but also—largely thanks to the application of the Brussels Regulation (Council Regulation No 44/2001 as amended by Council Regulation 2012/1215)—from other EU member states. Recent reforms affecting the role of the Competition Appeals Tribunal, as a result of which the latter stands to become the “forum of choice” especially for small claimants, can be read as confirming this trend.

Brexit stands to change all of the above: as the UK exits the Union, the Brussels Regulation, with its common and predictable rules on the identification of the competent court and its mutual recognition of judgments, will no longer be applicable. Accordingly, it is going to inaugurate a period of significant uncertainty for litigants: will “old” international arrangements designed to regulate these matters that had so far been replaced by the Brussels regime, “revive”, with the UK on its own right being a party to them? Can the British Parliament seek to secure some of the “benefits” of Council Regulation No 44/2001 by introducing legislation that “replicates” the Regulation’s features? Will domestic law rules that had so far been set aside as being incompatible with EU law become applicable again, and with what consequences?

This article seeks to investigate these issues. It will argue that Brexit may have significant adverse effects on the right of access to justice of those competition claimants that may wish to lodge their lawsuits in the UK courts as it may become far more complex to establish jurisdiction. It will be submitted that, until such time the UK negotiates a clear and certain legal arrangement with the EU in this area, the English High Court and the Competition Appeals Tribunal may stand to lose much of their appeal, especially for victims of transnational competition infringements.

It will be concluded that Brexit poses a number of significant and so far unexplored challenges for competition litigation in particular and the provision of legal services by UK law firms in general. As the UK Government considers its negotiating position, it is however unclear whether addressing these concerns will be a priority: accordingly, it is feared that a lively area of litigation, which in turn has spurred the growth of the provision of legal services in Britain, may be put in jeopardy unless concrete measures are in place to ensure a smooth transition and the continuity with the existing ties with the EU member states.

### 2. UK courts as a popular destination for plaintiffs in transnational competition claims... until 2019?

#### 2.1. British courts and competition claims: a “success story” ... so far?

It is beyond the limits of this contribution to examine the question of why competition claimants may decide to litigate their cases in a certain jurisdiction, including the UK. Generally, it may be observed that these claims often have a “transnational angle”, due to the interconnected nature of the UK and European economy; they are also likely to involve more than one defendant, thus potentially raising issues concerning parallel proceedings. Choosing where to sue is a complex decision for would-be plaintiffs who have to address a number of questions: some of them are of normative character, since they involve an assessment of standing and the identification of the competent court in light of the current rules on jurisdiction.<sup>1</sup> Others are of a more practical nature: for instance, a claimant may consider where the evidence of a prima facie competition infringement is located and how “easy” it is to access it, in accordance with the relevant legal standards in force in that jurisdiction; they may also

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<sup>1</sup> There is extensive literature on these issues. For an agile analysis, see inter alia Danov and Becker, Cross-border EU competition law actions, 2013: Hart Publishing Ltd, “Introduction”, especially pp. 10-12.

ask whether the rules on costs in force in a given jurisdiction may make its courts more or less accessible.<sup>2</sup>

The reputation of a court and of a legal also often plays a very important role. As was recently highlighted, the fact that English law is perceived as being “comparatively certain, stable and predictable” and the English courts are seen as being endowed with “independence and expertise and (...) reliability of their decisions” have been key factors behind the High Court’s “appeal” for litigants.<sup>3</sup> In this context, the existence of certain jurisdiction rules and of rules on the recognition of judgments is of particular importance.<sup>4</sup> Recent studies can be read as confirming that the UK courts and among them the High Court of England and Wales have emerged as “clear favourites” in the eyes of plaintiffs: evidence gathered by Danov and Becker in 2011, leading to a wide-ranging study published in 2013, illustrate that this jurisdiction is seen by the practitioners interviewed as being among the “leading” ones due to, among other factors, the applicable rules on disclosure of evidence and the speed in adjudication, relative to other member states.<sup>5</sup>

The three main studies conducted by Rodger and concerning competition litigation rates, respectively, from accession to the EEC to 2004, from 2005 to 2008 and from 2009 to 2012 appear consistent with these trends. It was found that litigation rates had steadily increased in the 1970s, 1980s and 1990s, with growth that was especially marked in the latter period, ostensibly due to, among other developments, the enactment of the Competition Act 1998 and the recognition of a cause of action for competition damages in EU law.<sup>6</sup> A similar upward trend was also detected in later years, with “steady practice” characterising the years between 2004 and 2007<sup>7</sup> and a “peak” in 2008, followed by, again, greater numbers of new actions being lodged in 2010 and 2011.<sup>8</sup> It is added that the new Rules of Procedure applicable to proceedings before the CAT, taken together with the Consumer Rights Act 2015, which has considerably facilitated the bringing of consumer claims via collective lawsuits is very likely to lead to a similar outcome, with the Tribunal consolidating its reputation and experience as the main forum for many competition claims.<sup>9</sup>

The forgoing remarks can be read as confirming that, just as in other commercial litigation areas, the English and more generally—if one considers also the CAT—UK courts have become a forum of choice for competition claims, which in turn provide a steady source of legal work for British based practitioners.<sup>10</sup> In this context, reliable rules governing the identification of the competent court and enshrining the principle of “mutual recognition of judgments” are of central importance by allowing claimants to make an informed decision taking into account among others the practical and legal factors outlined earlier, with the certainty that the judgment will be enforceable anywhere within the

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<sup>2</sup> See e.g. for England and Wales, Danov and Becker, cit. (fn. 2), pp. 42-43, 45-47.

<sup>3</sup> See inter alia, Allen and Overy, Brexit—legal consequences for commercial parties, Specialist Paper 1, 2/2016, available at:

<http://www.allenoverly.com/SiteCollectionDocuments/Brexit%20Governing%20Law%20Article%20specialist%20paper%20no%201.pdf>, p. 1.

<sup>4</sup> See inter alia Danov, “Private antitrust enforcement and private international law”, in Nagy (Ed), *The procedural aspects of the application of competition law*, 2016: Europa Law Publishing, p. 109 ff, especially pp. 110 and 113.

<sup>5</sup> Danov, Becker and Beaumont, “Introduction”, in Id. (Eds), cit. (fn. 1), p. 37; see also pp. 42-43.

<sup>6</sup> Case C-453/99, *Courage v Crehan*, [2001] ECR I-6097. See Rodger, “Competition Law litigation in the UK courts: a study of all cases up to 2004—Part I”, (2006) ECLR 241, pp. 242-243.

<sup>7</sup> Rodger, “Competition law litigation in the UK courts: a study of all cases, 2005-2008—Part I”, (2009) GCLR 93, pp. 95-96.

<sup>8</sup> Rodger, “Competition law litigation in the UK courts: a study of all cases, 2009-2012”, (2013) GCLR 55, pp. 57-58.

<sup>9</sup> See inter alia Andreangeli, “The changing structure of competition enforcement in the UK: the Competition Appeal Tribunal between present challenges and an uncertain future”, (2015) J of Antitrust Enforcement 1, see e.g. pp. 27-29.

<sup>10</sup> Danov et al., (cit.), fn. 1, p. 43.

EU.<sup>11</sup> The next section will sketch the key rules of the Brussels regulation and consider which features are particularly conducive to “enticing” competition claimants into a UK forum.

## 2.2. The Brussels Regulation and competition claims in England and Wales—the status quo

The previous section briefly illustrated some of the factors that have allowed the UK courts to become “the place to be” for competition claimants and argued that having clear rules on jurisdiction and on recognition and enforcement of judgments is especially important in these cases, due to their frequently “multi-defendant” and “multi-jurisdictional” nature. This section will recall the key features of the Brussels Regulation and provide a short commentary on how the UK courts have interpreted them in their competition litigation practice.

As was outlined in section 2.1, choosing where to sue in each particular case is a complex decision for would-be plaintiffs. It has been suggested that the Brussels Regulation facilitates this decision-making process, since it permits would-be claimants to rely on “several” alternative “heads of jurisdiction” and on rules preventing parallel proceedings in multiple fora.<sup>12</sup> To the extent that this is complemented by rules facilitating the execution of the member states courts’ judgments anywhere in the EU,<sup>13</sup> it can be agreed with commentators that the regime enshrined in the Brussels Regulation “reinforces inter-jurisdictional competition” between judges located in those member states that may be affected by a *prima facie* competition infringement and, as a result, makes it easier for a plaintiff to choose the “best suited court” for his or her claim.<sup>14</sup>

It is beyond the remit of this contribution to analyse in any detail the rules of the Brussels Regulation. It is however necessary to recall those provisions that are most relevant vis-à-vis the litigation of EU antitrust claims that as “civil and commercial matters”, fall within the scope of the Regulation’s regime.<sup>15</sup> Article 4 of the Brussels Regulation enshrines the general rule that an action should be brought where the defendant has its ‘domicile’, that is, in the case of corporate entities, its “statutory seat, central administration or principal place of business”.<sup>16</sup> The Regulation provides also for a number of special rules allowing the defendant to access a jurisdiction alternative to the one identified on the basis of the domicile principle: thus, if the action in question is “contract-based”, competent will be the court of the “place of performance of the obligation”.<sup>17</sup> If instead the lawsuit is in tort—in other words, if, according to the EU Court of Justice, it aims to establish the liability of the defendant and does not relate to a contract<sup>18</sup>—the claimant will be able to petition the court of the place where the “harmful event occurred”, in accordance with Article 7(2) of the Regulation.<sup>19</sup> This concept has been interpreted by the Court of Justice in *Bier* as allowing the plaintiff to sue either where the harmful event occurred or where the damage occurred.<sup>20</sup>

Determining jurisdiction on this ground is particularly important in competition damages cases, due to the complexities characterising anti-competitive behaviour.<sup>21</sup> In earlier judgments the EU Court of Justice seemed to take a restrictive view of this ground of jurisdiction: it held in *Dumez* that the competent court should be the one of the place where “the event giving rise to damage (...) directly

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<sup>11</sup> Danov, cit. (fn. 4), p. 113.

<sup>12</sup> Lianos, Nebbia and Davies, *Damages actions for the infringement of the EU competition rules*, 2015: OUP, p. 309.

<sup>13</sup> See Articles 32-56, Brussels Regulation.

<sup>14</sup> See, mutatis mutandis, Wurmnest, “International jurisdiction in competition damages cases under the Brussels Regulation”, (2016) 53(1) CMLRev 225, see e.g. 235-236.

<sup>15</sup> See inter alia case C-352/13, CDC Damages claims Hydrogen Peroxyde, [2015] ECR I-335, para. 20-22.

<sup>16</sup> E.g., Danov, cit. (fn. 4), especially pp. 115-116.

<sup>17</sup> Article 7(1), Brussels Regulation.

<sup>18</sup> See e.g. case 189/87, Kalfelis, [1988] ECR 5565, para. 17. For commentary, see e.g. Lianos et al., cit. (fn. 12), pp. 312 ff., especially p. 315.

<sup>19</sup> Article 7(2), Brussels Regulation.

<sup>20</sup> Case 21/76, *Bier*, [1976] ECR 1735, para. 10. For commentary, see Lianos et al. cit. (fn. 12), p. 316.

<sup>21</sup> See inter alia *SanDisk Corp v Philips Electronics NV*, [2007] EWHC 332, e.g. para. 25 and 41.

produced its harmful effects upon the (...) immediate victim of the event (...).<sup>22</sup> In the later *Marinari* decision, however, the Court clarified that this criterion should be applied in light of all the circumstances of the case and thus jurisdiction should accrue to the court of the place where the plaintiff suffered “initial damage”.<sup>23</sup> Thus, Article 7(2) could not “(...) be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere.”<sup>24</sup> This approach was also confirmed by the English Court of Appeal who in *Deutsche Bahn*<sup>25</sup> held that the provision should have been read as conferring jurisdiction to the court of the place where the “initial damage manifested itself”,<sup>26</sup> thus opening the way not just to direct but also to indirect purchasers bringing an action in that forum.<sup>27</sup>

Article 8 of the Brussels Regulation constitutes another central ingredient in the decision as to where to sue in competition cases—whether in tort or in contract—since it allows the “combination” of “cross border actions in multi-defendant cases” so that individual plaintiffs may litigate their case in the same court against all respondents.<sup>28</sup> This is subject to the condition that “(...) the claims [be] so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (...)”. Thus, since this danger is “automatic” in cases concerning the joint and several liability of, for instance, cartel members, this provision constitutes a very powerful tool for litigants who can consolidate several actions into one just on the basis of the circumstance that one defendant—the “anchor defendant”—is domiciled in a specific jurisdiction that, in the circumstances, could be especially advantageous for the claimant.<sup>29</sup>

The Brussels Regulation also deals with the possibility of parallel proceedings pending in different member states and concerning claims brought against different defendants involved in the same breach of the competition rules: according to Article 29, if proceedings are pending in different EU jurisdictions for “the same cause of action and between the same parties”, the second court which was petitioned has a duty to stay its proceedings.<sup>30</sup> Subsection (3) adds that once the jurisdiction of the “court first seized” is established, any other court is obliged to decline jurisdiction in its favour, should the same action be brought before it. Furthermore, Article 30 of the Regulation provides that if “related actions” are pending before different courts, the court second seized may stay its proceedings; if the jurisdiction of the court first seized is established, the court second seized may decline jurisdiction upon application from any of the parties and on condition that the law of the court first seized allows for the consolidation before it of the action with the lawsuit pending before it.<sup>31</sup>

And finally the Regulation provides for the principle of “mutual recognition of judgments”, as a result of which “a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.”<sup>32</sup> The Regulation precludes the court seeking to enforce a foreign judgment from carrying out a review on the merits of the decision;<sup>33</sup> it also limits considerably the grounds on which a court can decline to enforce a recognised judgment.<sup>34</sup> Moreover, it lays out a set of common rules governing the procedures that the courts of the member states should follow with a view to enforce (or to refuse to do so) a “recognised” judgment.<sup>35</sup>

<sup>22</sup> Case 220/88, *Dumez*, [1990] ECR I-49, para. 20.

<sup>23</sup> Case C-364/93, *Marinari*, [1995] ECR I-2719, para. 13, 15.

<sup>24</sup> *Id.*, para. 14.

<sup>25</sup> *Deutsche Bahn AG and others v Morgan Crucible and others*, [2013] EWCA Civ 1484.

<sup>26</sup> Per Tomlinson LJ, para. 22; for analysis see Lianos et al., cit. (fn. 12), p. 317-318.

<sup>27</sup> *Deutsche Bahn*, cit. (fn. 26), per Tomlinson LJ, para. 20. For commentary, see Lianos et al., cit. (fn. 12), p. 319.

<sup>28</sup> See e.g. Lianos et al., cit. (fn. 12), pp. 321-322.

<sup>29</sup> See inter alia *Danov*, cit. (fn. 4), p. 118; also Lianos et al., cit. (fn. 12), p. 322.

<sup>30</sup> See e.g. *Danov*, cit. (fn. 4), p. 128-130.

<sup>31</sup> *Ibid.*

<sup>32</sup> Article 36(1), Brussels Regulation.

<sup>33</sup> Article 39, Brussels Regulation.

<sup>34</sup> Article 45, Brussels Regulation.

<sup>35</sup> Articles 42-44, 46-51, Brussels Regulation.

In light of the forgoing, it is concluded that the Brussels Regulation provides clear and predictable rules as regards three aspects that are central to the decision as to “where to sue” in competition cases, due to their frequently transnational and multi-defendant nature and to their inherent complexity, which in turn often spurs plaintiffs into trying to “shop for the best forum”.<sup>36</sup> It is acknowledged that the system is not “flawless” for competition plaintiffs: for instance, Danov argued that since it does not allow the court seized with a given claim to decline jurisdiction in favour of another court on the basis of the fact that the latter is “best placed” to deal with it because, for instance, relevant evidence may be located in that jurisdiction, the Brussels regime would sometimes be not entirely “in tune” with the needs of competition claimants.<sup>37</sup> Nonetheless, as will be examined in the next section, the approach taken by the English Courts to the jurisdictional rules has proved to be consistent with avoiding multiple proceedings, thus ensuring the efficient litigation of these cases, and with the overall goal of facilitating access to justice for would-be claimants.

### 2.3. Jurisdiction rules in the UK courts: a “plaintiff friendly” approach?

The previous section sketched the Brussels Regulation’s provisions concerning the determination of jurisdiction and mutual recognition of judgments and argued that, despite its limits, this regime has, on the whole, helped claimants in choosing the “best-suited” forum for their action within the EU. This section will examine the way in which the UK courts have interpreted the jurisdictional rules and in particular those relevant for multi-defendant cases; thereafter it will explore to what extent their approach has encouraged claimants in lodging their actions.

It was anticipated in section 2.2 that Article 8(1) of the Brussels Regulation is especially important for multi-defendant competition cases, since it permits a plaintiff to “concentrate” a potentially significant number of claims before one forum that they may regard as being “advantageous”, with clear benefits in terms of avoiding parallel proceedings and inconsistent adjudication.<sup>38</sup> It is suggested that the approach adopted in the *Provimi* decision has proven instrumental to achieving this outcome and in particular to facilitating plaintiffs seeking to sue multiple defendants in the UK.<sup>39</sup> In that judgment, the High Court allowed the claimant to bring an action for damages against the UK-domiciled subsidiary of a non-UK company, provided that the claimant had made a *prima facie* showing that the former had “implemented [a] cartel” by applying prices that had been agreed by their respective, non-UK domiciled parent companies.<sup>40</sup>

The High Court held that since they formed part of two corporate groups and consequently of two “single economic units” and, consequently, had “no independence of mind, action or will”, both the UK-domiciled subsidiaries and their foreign parent companies could properly be sued in the English courts.<sup>41</sup> In its view, the fact that both defendants belonged to the same corporate groups and consequently to the same “single economic entity”, would have been sufficient to justify allowing the plaintiff to take action against them in the same court.<sup>42</sup> Consequently, it was not required to show that the subsidiary either had any knowledge or had acquiesced to the cartel.<sup>43</sup>

The *Provimi* judgment was welcomed by some as enshrining a “desirable” approach to determining jurisdiction in competition cases since it enabled “claimants to bring a consolidated damages claim against (...) groups of companies in one jurisdiction” and thereby avoided parallel proceedings.<sup>44</sup> However it was also criticised: for instance, in respect of follow on actions, could the

<sup>36</sup> Wurmnest, cit. (fn. 14), p. 235.

<sup>37</sup> Danov, cit. (fn. 4), p. 131.

<sup>38</sup> See e.g. Lawrence and Morfey, “Tactical manoeuvres in UK cartel damages litigation”, in Danov et al. (Eds), cit. (fn. 1), pp. 150-151.

<sup>39</sup> *Id.*, p. 150; see also p. 157-158.

<sup>40</sup> *Provimi Ltd v Aventis Animal Nutrition SA*, [2003] EWHC 961 (Comm), para. 29.

<sup>41</sup> *Id.*, para. 30-31, 34.

<sup>42</sup> *Id.*, para. 32.

<sup>43</sup> *Ibid.*

<sup>44</sup> Lianos et al., cit. (fn. 12), p. 323; also Danov, cit. (fn. 4), p. 119-120.

“single economic entity” test apply to ground jurisdiction for the English courts even when the anchor defendant was not named as one of the infringers by the administrative decision adopted, for instance, by the EU Commission?<sup>45</sup> And more generally, should this very generous notion of the jurisdiction rules, influenced by the application of the EU law concept of ‘undertaking’ as “single economic entity” be relied upon in all cases, even when the English courts may not be the “best placed” forum to deal with the dispute<sup>46</sup>

In respect of the former issue, the High Court in its *Cooper Tyre* judgment<sup>47</sup> expressed concern at the apparently sweeping impact of *Provimi*<sup>48</sup> in a case where the non-UK domiciled parent company of an “anchor defendant” subsidiary had been sued in England, on the ground of being part of the same “single economic entity”, even though it was not among the named addressees of an EU competition infringement decision. On appeal, Lord Justice Teare acknowledged that, on the one hand, it was “normal” for the Commission to “wish to fine a parent company” with which the subsidiaries would be jointly and severally liable, on the basis of a presumption that the former would exercise a “significant influence” over the latter.<sup>49</sup> On the other hand, he sounded doubtful that “(...) a subsidiary should be liable for what its parent does, let alone for what another subsidiary does (...)”<sup>50</sup> in all cases, including, for instance, when the group member elected as “anchor defendant” may not even be active in the same market as the one affected by the cartel.<sup>51</sup>

It was however with the Competition Appeals Tribunal’s judgment in *Emerson Electric* that some boundaries were laid out as to the reach of *Provimi*. This decision concerned a follow-on action, based on a Commission decision, whose circumstances mirrored those of *Provimi*: in other words, the anchor defendant was not among those subsidiaries named in the infringement decision. The Tribunal decided that the claim against Carbon GB Ltd, the UK-domiciled subsidiary of the French-based Carbone SA should be struck out on the ground that the name of the former defendant did not appear among the list of addressees of the original EU Commission decision.<sup>52</sup>

This judgment was confirmed on appeal: Lord Justice Mummery acknowledged that the notion of ‘undertaking’ for the purpose of applying EU competition law could embrace complex “units” encompassing several corporate entities, subject to the “decisive influence” test.<sup>53</sup> Nonetheless, he emphasised that in a follow-on action liability could only be claimed against those companies that had expressly been named as addressees of the infringement decision.<sup>54</sup> In his view, since the decision was neither “addressed to the whole group of companies collectively, which would include Carbone GB”, nor to the defendant individually, the latter could not be sued on the basis of Section 47 of the Competition Act.<sup>55</sup>

It is difficult to understate the importance of *Provimi* for the purpose of founding jurisdiction for a multi-defendant competition claim in the UK courts: it has been observed that through it “the English courts have expanded the possibilities for claimants to bring follow-on or standalone damages actions in the UK”, to the extent that this interpretation of Article 8(1) permits “a potential claimant [to] (...) hook on to non-UK domiciled firms (...) by simply pleading that a UK subsidiary” belonging to the same corporate group “had implemented and had knowledge of the cartel infringement” on the basis of the

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<sup>45</sup>Danov, loc. ult. cit.; also Lianos et al., cit. (fn. 12), pp. 324-325. See e.g. *Cooper Tyre & Rubber Co and others*, [2009] EWHC 269 (Comm); [2010] EWCA Civ 864.

<sup>46</sup>Ibid.

<sup>47</sup>*Cooper Tyre*, [2009] EWHC (Comm) 269, para. 50; see also para. 55-56, 64.

<sup>48</sup>Id., para. 34; see also para. 45.

<sup>49</sup>Id., para. 34.

<sup>50</sup>Id., para. 45.

<sup>51</sup>Ibid.; see also para. 46. See also, e.g., *Toshiba Carrier UK Ltd and others*, [2012] EWCA Civ 1190, para. 25-27; see also para. 37-39.

<sup>52</sup>*Emerson Electric Co v Morgan Crucible Co Plc and others*, [2011] CAT 4, para. 52; see also para. 27-28.

<sup>53</sup>[2012] EWCA Civ 1559, para. 73-74.

<sup>54</sup>Id., para. 78-79.

<sup>55</sup>Id., para. 80; see also para. 83.

“single economic entity” concept and thereby take advantage of “generous evidential requirements” offered by the applicable procedural law.<sup>56</sup>

Recent commentary added that this outcome would be consistent with goals of effective access to justice and more efficient and frequent competition litigation.<sup>57</sup> It was acknowledged that the recent CAT judgment in Emerson Electric has somehow redefined the contours of *Provimi*, thus going some way toward limiting the uncertainties arising from identifying an “anchor defendant” among the members of often complex corporate groups.<sup>58</sup> Nonetheless, it is argued that the approach adopted in that judgment and its later applications remain broadly in line with the “victim-friendly interpretation” of the rules on jurisdiction in these cases that the EU Court of Justice has recently adopted for instance in the *CDC Hydrogen Peroxide*<sup>59</sup> decision.<sup>60</sup>

In light of the forgoing analysis, it may be concluded that the approach adopted by the English courts vis-à-vis the rules on jurisdiction, contained in the Brussels Regulation, has been decisive toward electing this forum as “the place to be” for plaintiffs in competition cases. It is acknowledged that the way in which the jurisdictional rules are applied is not immune from criticism, especially because it does not seem to take into account the potential uncertainties arising from the likelihood of civil proceedings and administrative investigations running in parallel.<sup>61</sup> Nonetheless, it has paved the way for greater recourse to the courts with a view to obtaining redress of competition injuries. The next section will explore some of the possible implication of the UK exit from the European Union for this rather “favourable” status quo.

### 3. Brexit and competition litigation: marking the “fall from grace” of the UK courts?

#### 3.1. Exiting the EU: an end to the safe harbour of the Brussels regime... and what next?

The previous section provided a snapshot of the Brussels regulation regime and an short illustration of those features of it that have led to the UK courts becoming a “favoured destination” for competition claimants, with clear advantages especially for the legal services industry in the UK. However, Brexit stands to change all this. It is clear that one of the most immediate consequences of the UK no longer being an EU member state will be the inapplicability of the Brussels Regulation rules on the determination of the competent court and on the avoidance of parallel judgments (especially through claim consolidation in multi-defendant cases). Also, the British judgments will no longer benefit from the principles of recognition and from the rules on enforcement also enshrined in the Regulation.

In respect of the issue of the jurisdiction rules, it has been suggested that this may mark the re-emergence of a number of principles of common law that had been made inapplicable under the Brussels Regulation regime: for instance, it was wondered whether it may become possible again for the UK Courts to rely on the doctrine of *forum non conveniens* as a means of declining jurisdiction in cases in which an English courts takes the view that the case “may justly be tried elsewhere”.<sup>62</sup> It could be argued that if it was to “revive”, this principle, which was declared incompatible with the domicile-based approach to jurisdiction enshrined in the Regulation and, more generally with the full

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<sup>56</sup> Lianos, et al., cit. (fn. 12), p. 340.

<sup>57</sup> Danov, cit. (fn. 4), p. 118-119.

<sup>58</sup> See e.g., mutatis mutandis, Danov, “Cross border competition law cases: level playing field for undertakings and redress for consumer”, (2014) 35(1) ECLR 487, pp. 490-491.

<sup>59</sup> Case C-352/13, *CDC Hydrogen Peroxide SA v Akzo Nobel SA and others*, [2015] ECR I-335, especially para. 21-26.

<sup>60</sup> Wurmnest, cit. (fn. 14), p. 235.

<sup>61</sup> Danov, “Jurisdiction in cross-border EU competition law cases: some specific issues requiring specific solutions”, in Danov et al. (Eds), cit. (fn. 1), p. 180.

<sup>62</sup> Anton, *Private International Law*, 3<sup>rd</sup> Edition, section 8.13.



effectiveness of its regime,<sup>63</sup> would result in the UK courts regaining some “control” over the extent of their adjudicating powers, perhaps obviating some of the concerns raised in light of *Provimi*. Nonetheless, it must be acknowledged that its potential application could increase legal uncertainty in a scenario where a long-standing set of common rules has already ceased to apply.<sup>64</sup>

Further questions could arise in respect of arbitration clauses or agreements granting jurisdiction to the UK courts. In *West Tankers* the EU Court of Justice famously held that the English Courts could not “(...) restrain a person from commencing or continuing proceedings before the courts of another Member State on the ground that such proceedings would be contrary to an arbitration agreement (...)”; to hold otherwise would have run counter the key objectives of the Regulation, namely to harmonise “(...) the rules of conflict of jurisdiction in civil and commercial matters and the free movement of decisions (...)”.<sup>65</sup> It has been suggested that post-Brexit, other EU courts would no longer be required to decline jurisdiction in favour of the English or Scottish courts: consequently, it was argued that, once the *West Tankers* principle becomes inapplicable vis-à-vis UK judiciaries seeking an anti-suit injunction would become a way of “entrenching” to some degree the power of UK courts to decide on a given dispute.<sup>66</sup>

Legal uncertainty as regards the recognition and enforcement of judgments is also likely to suffer. It has been suggested, not without merit, that courts in other member states could continue to be “willing” to recognise and enforce UK judgments;<sup>67</sup> nonetheless, it may be foreseen that the “simplified” procedure enshrined in the Brussels Regulation would become inapplicable and therefore this issue would be governed by the law in force in the member state where a victorious party seeks to enforce these judicial decisions, thus adding complexity, length and costs.<sup>68</sup>

In light of the forgoing, it is legitimate to query “what can be done” to ensure that many of the “benefits” arising from the Brussels Regulation regime and accrued to the UK courts are not lost. For instance, it has been mooted that the UK parliament could decide to enact rules that mirror the Regulation itself, thereby preserving much of the status quo. While this may look appealing, it has been regarded as being highly problematic due to the circumstance that the existing norms are based on reciprocity. In other words, while the UK could legislate to the effect that, for instance, its courts would be obliged to recognise judgments of other EU courts, it could not ensure that the latter would be subject to a similar duty.<sup>69</sup>

As a possible alternative option, it has been queried whether, once the Brussels Regulation becomes inapplicable, international instruments that had been in force before the enactment of the Regulation, if not before the UK accession to the EEC, would become applicable again.<sup>70</sup> As was aptly put by Dickinson in a recent article, would the UK “revert” to being bound, as a “stand-alone” contracting state, to observe conventions such as, among others, the Lugano Convention concluded in 2007 and concerning jurisdiction and recognition and enforcement of judgments, the 1980 Rome Convention or even the 1968 Brussels Convention?<sup>71</sup>

It was argued that the 1980 Rome Convention could be a “good candidate” for testing this possibility, since it had been “open for signature by parties who (at that time) were members of the

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<sup>63</sup> See case C-68/93, *Shevill*, [1995] ECR I-415, para. 35-37. See also, *mutatis mutandis*, case C185/07, *West Tankers*, [2009] ECR I-663, especially para. 22-24 and 27-29.

<sup>64</sup> See inter alia Allen and Overy, *Brexit—legal consequences for commercial parties*, Paper 2, available at: [http://www.allenoverly.com/SiteCollectionDocuments/Brexit\\_-\\_Specialist\\_Paper\\_No\\_2\\_-\\_English\\_jurisdiction\\_clauses\\_-\\_should\\_commercial\\_parties\\_change\\_their\\_approach.PDF](http://www.allenoverly.com/SiteCollectionDocuments/Brexit_-_Specialist_Paper_No_2_-_English_jurisdiction_clauses_-_should_commercial_parties_change_their_approach.PDF).

<sup>65</sup> *West Tankers*, cit. (fn. 53), para. 19, 24. See inter alia Ahmed, “Brexit and English jurisdiction agreements”, available at: [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2839342](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2839342), p. 4.

<sup>66</sup> Ahmed, loc. ult. cit.

<sup>67</sup> See e.g., Allen and Overy, cit. (fn. 48), p. 2.

<sup>68</sup> See e.g. Ahmed, cit. (fn. 65), pp. 3-4.

<sup>69</sup> Id., p. 3.

<sup>70</sup> Dickinson, “The consequences of EU exit for private international law”, (2016) Issue 2 *Journal of Private International Law* 195, p. 199.

<sup>71</sup> Id., p. 202.

EEC”, as was the UK.<sup>72</sup> Moreover, it was emphasised that the Convention remains in force to the extent that it binds also, inter alia, “overseas territories to which the EU” would not extend” and, perhaps more importantly, its application to a non-EU member state would not be affected by the fact that for EU member states, it was “replaced by the Rome I Regulation.”<sup>73</sup> On a similar vein, it has also been suggested that the 1968 Brussels Convention might again become applicable, since accession to it on the part of the UK was contingent upon EEC membership. It was also highlighted that the Convention itself has remained applicable to “relations with the territories of the member states to which (...) the EU Treaties” do not apply.<sup>74</sup>

Furthermore, having regard to cases in which English courts may have seized jurisdiction on a dispute thanks to a choice of court agreement, it was mooted that the Hague Convention on Choice of Court agreements, concluded by the EU on behalf of its member states with a number of overseas countries could provide a solution to the gap left by the Brussels regime. It has been acknowledged that this instrument would only allow for (inter alia) the mutual recognition of judgments given by an English court that has seized jurisdiction on a dispute on the basis of a choice of court agreement.<sup>75</sup> Nonetheless, it has been suggested that it could at least in part “reproduce” some of the positive aspects of the Brussels regime in these cases:<sup>76</sup> it has been argued that should litigants have decided to commence parallel proceedings in another EU jurisdiction, despite the English Courts have been elected as competent to hear the case through a similar clause, an “anti-suit injunction” could have been sought to prevent the foreign court from adjudicating<sup>77</sup>--an outcome that would be possible due to the intervening inapplicability of the *West Tankers* principles.<sup>78</sup>

There are however a number of objections to these scenarios. In respect to “reviving” old international treaties, Dickinson argued that it could be “entirely possible that the European Court of Justice (...) would reach a different conclusion”, for instance by taking the view that “the process of change should be in one direction only”:<sup>79</sup> in other words, once the Brussels Regulation has been enacted, it would no longer be possible to “resuscitate” the 1968 Convention, and thereby to invoke it as between the member states and between the member states and non EU states.<sup>80</sup>

On this basis, it appears in the least unclear what the post-Brexit scenario would look like in terms of the rules on jurisdiction and on the recognition of judgments handed down by UK courts, let alone whether it could be possible for the UK to “maintain” any of the positive features of the existing regime, due to its reciprocal nature.<sup>81</sup> It was suggested that unless the UK sought to negotiate its own agreement with the EU, along the lines, perhaps, of the “old” Brussels and Rome conventions, in order to lay out rules governing matters of jurisdiction and the recognition of judgments, the continuing observance of the Brussels regulation principles to the benefit of UK Courts post-Brexit would be at the very least doubtful.<sup>82</sup> It is acknowledged that these issues will probably be among those that will be settled as part of the exit negotiations. Nonetheless, it is far from clear how high in the scale of priority they will be, let alone whether sufficient political will exists among the other EU member

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<sup>72</sup> Id., p. 203.

<sup>73</sup> Ibid.

<sup>74</sup> Id., p. 204.

<sup>75</sup> Ahmed, cit. (fn. 65), p. 9-10.

<sup>76</sup> Ibid.

<sup>77</sup> Ahmed and Beaumont, “Exclusive choice of court agreements: some issues on the Hague Convention on Choice of Court Agreements and its relationship with the Brussels I Recast especially anti-suit injunctions, concurrent proceedings and the implications of BREXIT”, available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2824703](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2824703), pp. 16-17.

<sup>78</sup> Id., p. 15.

<sup>79</sup> Dickinson, cit. (fn. 70), p. 205

<sup>80</sup> Id., p. 206.

<sup>81</sup> Id., pp. 209-210.

<sup>82</sup> Id., p. 210; see also, inter alia, Ahmed, cit. (fn. 65), p. 2.

states to agree that the UK become a party to existing instruments, such as the Lugano and Hague Conventions, in its own right.<sup>83</sup>

In light of the forgoing analysis, it may be concluded that the UK exit from the EU is going to lead to a period of significant uncertainty for claimants seeking to establish jurisdiction for their civil claims, including competition claims, in the UK courts, due to the intervening inapplicability, at least for a time, of common, accepted rules on jurisdiction, on dealing with parallel proceedings and on the mutual recognition of judgments handed down by these courts vis-à-vis the judiciaries of the other member states. The next, concluding section will explore some the implications for competition litigation more particularly and especially on the continuing appeal of the British courts as “forum of choice” for these actions.

### 3.2. Brexit and competition litigation in the UK: undoing a success story? Tentative conclusions

The previous sections briefly examined the nature of the regime established by the Brussels Regulation as regards jurisdiction and recognition of judgments within the EU and thereafter considered how these principles have been applied by the UK courts in competition cases. Section 3.1 contrasted the status quo with the possible aftermath of the UK’s exit from the EU. It was argued that this momentous event is very likely to herald an era of significant uncertainty as regards the ability of claimants to make informed choices as to where to sue, on the basis of objective factors encompassing, among others, the reputation and standing of the chosen court, the speed of its proceedings and the availability of evidentiary rules that may appear “favourable” to them.<sup>84</sup> Various possible scenarios were examined, ranging from the unilateral enactment of internal legislation designed, in some way, to reproduce the features of the current regime to the “reviving” of pre-Regulation 44/2001 international convention.<sup>85</sup> It was however apparent that moving away from such a well-established and well-functioning regime is going to create significant difficulties and require, at the very least, the UK re-acceding to some of these international treaties.

In light of the forgoing, it is at least unclear what the impact of Brexit could be for the central role of the UK courts, including the Competition Appeals Tribunal, in the litigation of competition claims. It was highlighted how the possibility to identify an “anchor defendant” in the UK on the basis of one of the grounds for jurisdiction provided in the Brussels Regulation and to subsequently “centralise” claims arising from the same anti-competitive practice, and involving multiple defendants, has proven extremely appealing for claimants, who regarded, with good reasons, these courts as “expert” and “efficient” judges of their suits.<sup>86</sup> Thus, to the extent that it also allows a final judgment to “travel” in other member states for the purpose of execution, it can legitimately be argued that the Brussels regime has been at the core of this success story.

It is acknowledged that, come the actual withdrawal of the UK from the EU, greater clarity will have been achieved as regards the type of “settlement” concerning the relations between the two parties. Nonetheless, it is to be expected that until such time as practical arrangements are in place, claimants may find “the CJEU and the courts of other Contracting States (...) to be a hostile environment to UK litigants”.<sup>87</sup> It is added that the intervening inability of a claimant to rely on the Brussels Regulation rules concerning parallel proceedings and the consolidation of actions in one forum vis-à-vis other European courts, could significantly increase the likelihood of parallel proceedings and, consequently, of inconsistent adjudication, thus making the UK courts a much less appealing venue where to sue.<sup>88</sup> Although it has been suggested that choice of court agreements may

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<sup>83</sup> Dickinson, loc. ult. cit.; also inter alia Allen and Overy, cit. (fn. 3), p. 4.

<sup>84</sup> See inter alia Danov, (2014), cit. (fn. 58), pp. 490-491.

<sup>85</sup> Dickinson, cit. (fn. 70), pp. 202-204; also 210.

<sup>86</sup> See inter alia Balmain and Coughlan, “More haste less speed: the evolving practice in competition damages actions in the UK”, (2011) 4(4) GCLR 147, pp. 149-150.

<sup>87</sup> Dickinson, cit. (fn. 70), p. 210.

<sup>88</sup> Ahmed and Beaumont, cit. (fn. 77), pp. 15-16.

go some way toward avoiding such uncertainty, it cannot be excluded that the Court of Justice itself may still confirm the *West Tankers* approach and thereby prevent EU courts from declining jurisdiction in these cases.<sup>89</sup>

It is also noteworthy that over the years other jurisdictions have emerged as being relatively more “plaintiff-friendly” than in the past, for competition claims: as was explored by Peyer and more recently by Danov and Becker, the Netherlands and Germany provide measures aimed at facilitating the lodging of these lawsuits, such as the Dutch discipline on claim management companies<sup>90</sup> and on opt-out, class action-style collective claims or the German rules on standing to claim competition damages.<sup>91</sup> Consequently, it is argued that after the UK exit from the EU other jurisdictions could gain, at least in part, the pivotal role of British courts in attracting these cases.<sup>92</sup>

It can therefore be concluded that until a clearer picture emerges as to new rules governing jurisdiction, choice of applicable law and recognition and enforcement of judgments between the EU and the UK, the current rates of competition litigation are going to be adversely affected by the uncertainty that is going to follow from Brexit. While this is undoubtedly going to be of great concern for legal service providers, it is not limited to them: as is well-known, the UK Parliament has made significant efforts toward facilitating small claimants in seeking redress of their injuries, especially by boosting the role of and access to the CAT. Accordingly, as the Tribunal stands to lose the “benefits” of the soon inapplicable Brussels Regulation regime, it appears likely that along with lawyers, consumers whose interests have been aggrieved as a result of infringements of EU competition law, may well be among the first casualties of the UK exit from the Union.

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<sup>89</sup> Id., p. 17.

<sup>90</sup> Danov, Fairgrieve and Howells, “Collective redress proceedings: how to close the enforcement gap”, in Danov et al. (Eds), cit. (fn.1 ), pp.257-258.

<sup>91</sup> Peyer, “Myths and untold stories”, (2010), available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1672695](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695), pp. 12-13.

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